No. 05-1326

IN THE

Supreme Court of the United States

EULICE M. HOLLIMAN,

Petitioner,

v.

CLARK ATLANTA UNIVERSITY, INC. and NATHANIEL ROBERTS, JR.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioner has presented compelling reasons to grant the Petition, where the Eleventh Circuit's Opinion affirming the District Court's rigorous analysis of Petitioner's evidence does not conflict with a decision of this Court or a Court of Appeals, and where Petitioner does not claim that the Eleventh Circuit's ruling implicates an important federal question that has not been settled by this Court.

CORPORATE DISCLOSURE STATEMENT

Clark Atlanta University, Inc. is a privately-owned institution. No individual or corporation owns 10% or more of Clark Atlanta University, Inc.'s stock.

TABLE OF CONTENTS

	Page
Question Presented	i
Corporate Disclosure Statement	ii
Table of Contents	iii
Table of Cited Authorities	v
Introduction	1
Response to Petitioner's Statement of the Case	1
Reasons for Denying the Petition	2
I. The District Court Properly Found that Petitioner Did Not Show that the Alleged Harassment was "Based on Her Sex"	4
A. The Record Evidence Shows that Roberts' Alleged Conduct Was Not Gender-Specific	5
B. The Proffered Evidence From Third Party Witnesses Concerning Roberts' Alleged Conduct in the Pre-Limitations Period Does Not Diminish the Correctness of the Lower Court's Finding that Roberts' Conduct Was Not Gender-Specific	7

Contents

Page

II. The District Court Properly Found that Dismissal of Petitioner's Hostile Environment Claim Was Required Because the Conduct Alleged Was Not Severe or Pervasive 9

A. Petitioner Cannot Rely Solely on Her and Her Female Co-Workers' Subjective Beliefs 10

B. Petitioner Cannot Establish That The Alleged Harassment Was Sufficiently Severe or Pervasive 12

III. The Decisions From the Eighth and Ninth Circuits are Distinguishable Because They Both Involve Actual Threats of Physical Harm and Evidence of Physical Abuse Against Female Employees 15

IV. Petitioner Does Not Seek Review of the Lower Court's Dismissal of Her Retaliation Claim or Her State Law Claims 17

V. The District Court Did Not Abuse Its Discretion in Striking the Affidavit of Richard McLemore 19

Conclusion 20

TABLE OF CITED AUTHORITIES

Page

Cases:

Baskerville v. Culligan Int'l Co., 50 F.3d 428 (7th Cir. 1995) 13

Clark County School District v. Breeden, 532 U.S. 268 (2001) 11

EEOC v. National Education Association, Alaska, 422 F.3d 840 (9th Cir. 2005) 15

Faragher v. City of Boca Raton, 524 U.S. 775 (1998) 12, 14

Fed. Sav. & Loan Ins. Corp. v. Haralson, 813 F.2d 370 (11th Cir. 1987 18

Glover v. United States, 531 U.S. 198 (2001) 17, 18

Gupta v. Florida Bd. of Regents, 212 F.3d 571 (11th Cir. 2000) 4, 10, 11, 14

Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993) 4, 10, 11, 13

Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982) 4, 6, 13, 14

Indest v. Freeman Decorating, Inc., 164 F.3d 258 (5th Cir. 1999) 10

Cited Authorities

Page

Kopp v. Samaritan Health System, Inc., 13 F.3d 264 (8th Cir. 1993) 15, 16

Lind v. United Parcel Service, 254 F.3d 1281 (11th Cir. 2001) 18, 20

Mendoza v. Borden, Inc., 195 F.3d 1238 (11th Cir. 1999) 11, 12, 14

Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986) 3, 10, 13

National Railroad Passenger Corp. v. Morgan, 536 U.S. 101 (2002) 7, 8, 9

Nelson v. Adams USA, Inc., 529 U.S. 460 (2000) .. 18

Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998) 4, 11

Taylor v. Freeland & Kronz, 503 U.S. 638 (1992) 18

Van T. Junkins and Assocs., Inc. v. U.S. Indus., 736 F.2d 656 (11th Cir. 1984) 19

Watkins v. Bowden, 105 F.3d 1344 (11th Cir. 1997) 13

Yee v. Escondido, 503 U.S. 519 (1992) 17

Cited Authorities

Page

Statutes:

42 U.S.C. § 2000e 1

42 U.S.C. § 2000e-5(e)(1) 7

Rules:

Fed. R. Civ. P. 26 19

Fed. R. Civ. P. 37(c) 19

F.R.A.P. 28(a) 18

Sup. Ct. R. 10 ..... 1, 2

Sup. Ct. R. 10(a) 1

Sup. Ct. R. 10(b) 1

Sup. Ct. R. 10(c) 1

Sup. Ct. R. 14.1 17

INTRODUCTION

Petitioner has presented no "compelling reasons" for her Petition for a Writ of Certiorari to be granted ("Petition"). *See* Sup. Ct. R. 10. Specifically, Petitioner fails to demonstrate that the Eleventh Circuit's January 17, 2006 Opinion ("Opinion") – which affirmed the District Court's rigorous analysis of Petitioner's evidence – is in conflict with a decision of this Court or another Court of Appeals, or that the Eleventh Circuit decided an important federal question that has not been settled by this Court. *See* Sup. Ct. R. 10(a)-(c). In actuality, all that Petitioner has done is challenge the lower court's findings of fact and the application of a properly stated rule of law. Such challenges, however, do not warrant review by this Court. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). Therefore, the Petition should be denied.

RESPONSE TO PETITIONER'S STATEMENT OF THE CASE

Petitioner Eulice M. Petitioner ("Petitioner"), a former employee of Respondent Clark Atlanta University, Inc. ("CAU"), alleges that CAU subjected her to a gender-based hostile work environment, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e ("Title VII"), based on the allegedly demeaning, militaristic and harsh manner in which a male supervisor, Respondent Nathaniel Roberts, Jr. ("Roberts"), spoke to her. Petitioner filed the instant lawsuit on January 16, 2003. (R-1). Petitioner filed her Second Amended Complaint on June 9, 2003. (R-13; Pet. App. at A143-A171). CAU and Roberts separately filed their

Motions for Summary Judgment on July 12, 2004. (R-44, R-45). On February 3, 2005, the Magistrate Judge issued a Final Report and Recommendation ("R&R") recommending granting CAU's and Roberts' motions for summary judgment. (R-97; Pet. App. at A4-A57). The R&R was based on multiple grounds. Of primary importance to this Petition are the findings that Petitioner failed to establish a *prima facie* case of hostile work environment harassment because (1) none of Roberts' alleged comments or conduct were gender-specific or bore any relation to Petitioner's protected status as a woman,[1] and (2) the nine allegedly harassing incidents that took place between December 13, 2000 through June 19, 2001 were too isolated to rise to the level of severe or pervasive conduct.[2] By Order dated March 2, 2005, the District Court adopted the R&R and dismissed Petitioner's Title VII hostile work environment harassment claim. (R-100 adopting R-97; Pet. App. at A3). Petitioner filed a notice of appeal to the United States Court of Appeals for the Eleventh Circuit on April 1, 2005. (R-104). Oral argument was held on January 12, 2006, and the Eleventh Circuit issued an Opinion affirming the grant of summary judgment on January 17, 2006. (Pet. App. at A1-A2).

REASONS FOR DENYING THE PETITION

The decisions below do not conflict with a decision of this Court or any Court of Appeals nor do they implicate a federal question that has not been decided by this Court. Accordingly, Petitioner has not carried her burden of proof demonstrating any "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10.

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1. *See* Pet. App. at A31-A32.

2. *See* Pet. App. at A34-A35.

At its core, Petitioners basic argument is that she can establish a Title VII violation by asserting that Roberts' so-called "normal abrasive and militaristic management style"[3] affected female workers more severely than their male counterparts. As a matter of law and sound policy, Petitioner cannot prevail on that contention.

In *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986), this Court confirmed that Title VII "evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in the workplace." The current Petition, however, seeks to expand Title VII's coverage beyond "disparate treatment" to encompass ***disparate effects*** of similar treatment of men and women in the workplace.[4] Such an unwarranted expansion is not authorized under this Court's controlling authorities. *See, e.g., Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81 (1998) ("Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at '*discriminat[ion]* . . . because of sex.' . . . 'The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.' ") (quoting *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 25 (1993)). The Eleventh Circuit has not, as Petitioner alleges, been inconsistent in its application of

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3. Pet. p. 29.

4. The true intent of Petitioner's argument was revealed in her brief to the Eleventh Circuit, wherein she contended: "Under *Morgan*, a jury would be able to determine whether the cumulative effect of Roberts' conduct affected the female employees in such a manner as to create a hostile and abusive work environment, as compared to the similarly situated male employees." (Appellant's Initial Brief, p. 29).

this Court's precedent, but has instead held true to well-settled authority requiring a showing that the alleged harassment was "because of sex." No such showing was made by Petitioner in this case; therefore, the Eleventh Circuit properly affirmed the District Court's grant of summary judgment.

I. The District Court Properly Found that Petitioner Did Not Show that the Alleged Harassment was "Based on Her Sex".

To succeed on a hostile work environment harassment claim, Petitioner must establish that the alleged harassment was motivated by her gender. *See Gupta v. Florida Bd. of Regents*, 212 F.3d 571, 583 (11th Cir. 2000) ("[T]he statements and conduct must be of a sexual or gender-related nature . . . before they are considered in determining whether the severe or pervasive requirement is met."). To establish that the harm alleged was "based on her sex, [Petitioner] must show that but for the fact of her sex, she would not have been the object of harassment." *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982) . Here, the district court held that Petitioner failed to make out a *prima facie* case of hostile work environment harassment because she could not demonstrate that Roberts' alleged comments or conduct were gender-specific or bore any relation to her protected status as a female. (Pet. App. at A31-A32). The record supports this finding.[5]

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5. Petitioner also admits that Roberts treated male employees harshly. (Pet. p. 28). ("The record shows [that] male employees acknowledged the abrasiveness of Mr. Roberts[.]").

A. The Record Evidence Shows that Roberts' Alleged Conduct Was Not Gender-Specific.

The witness testimony in this case yielded numerous examples of Roberts' abrasive conduct towards male employees. For example, Teja Singh, former Director of Grants and Contracts, testified that there were occasions in which he "felt Mr. Roberts was demeaning [him]." (R-72 p. 24-25). Singh also testified that Roberts would "shout" at him and ask questions in a "more aggressive way." (*Id.* at 41). Other CAU employees witnessed Roberts' demeaning and harsh treatment of Singh. Pam Pressley testified that, "Nate [Roberts] could be very disrespectful to Teja [Singh]." (R-70, pp. 35-36). Marinetta Blalock also testified that she observed Roberts being "belligerent" towards Singh. (R-55 p. 23).

Singh was not the only male whom Roberts treated in a rude or demeaning manner. Vice President of Finance Robert Young stated that Roberts could be "sarcastic" and "demeaning" and he related a specific incident in which Roberts "got loud and short and flippant, totally unprofessional, towards him (Young)." (R-75 pp. 95-96). Young also testified that David Alexander, Director of Facilities, had complained to him about "Mr. Roberts and the way he communicated with him[,] [and stated] that Mr. Roberts was harsh [and] sarcastic in his tone and in his demeanor." (R-75 p. 45). Another male employee, Daryl Givens, testified that Roberts has "gotten loud" with him and "repeated a question to [Givens] more than once" in his usual abrasive manner. (R-62 pp. 58-61). Givens stated that he also observed Roberts speaking to Singh "in a harsh manner" and that another male employee, Kif, would be in a "heated" mood – i.e., visibly upset – after meeting with Roberts in the hallway. (*Id.* at 21-26). Givens also noted that

Patrick Thomas had "personality conflicts with [Roberts]." (*Id.* at 33).

Far from having any relation to gender, the record evidence establishes that Roberts could "exhibit[] a hard militaristic style" of management which, at times, "didn't give the mutual respect required." (R-75, p. 94). As a result, Roberts was not well liked by anyone at the University, male or female. (R-60 p. 77). Paula Barnes, an accountant, attributed Roberts' discourteous treatment to the fact that Roberts "was just a mean, nasty person."[6] (R-54 pp. 16-17). These and other examples precluded the possibility of any finding of gender bias based on Roberts' management style and work-related interactions.[7] *See, e.g., Henson*, 682 F.2d at 904 ("[W]here the conduct complained of is equally offensive to male and female workers[,] . . . the sexual harassment would not be based upon sex because men and women are accorded like treatment[,] . . . [and] the plaintiff would have no remedy under Title VII.").

The uncontroverted testimony of numerous CAU employees conclusively demonstrated that Roberts was just

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6. Barnes also testified that it never crossed her mind that Roberts' behavior had anything to do with gender, i.e., "a male/female thing." (R-54 p. 17).

7. *See also* Deposition of Toyah Ellis, (R-60 p. 65) (Ellis observed Roberts' interactions with the employees in the predominantly male Grants and Contracts department, and she stated that Roberts was "abrasive" in dealing with those individuals. Ellis candidly noted that Roberts is "an abrupt and abrasive person; that's who he is."); Deposition of Latonia Franklin, (R-61 p. 12) ("There was another department that we worked in that had basically mostly males in the department, and I just heard [Roberts] had a couple of run-ins with people in the department, [and] the head of the department [i.e., Singh].").

as demeaning to males as he was to females. Hence, the district court correctly found that Petitioner had no basis for contending that the alleged verbally abusive treatment she received from Roberts had anything to do with her gender.[8] (Pet. App. at A33) ("Plaintiff's asserted harassment was not based on her gender because men and women were accorded like treatment, and the evidence shows that Defendant Roberts was not well-liked by men or women.") (cits. omitted). The Eleventh Circuit properly affirmed the grant of summary judgment on this basis.

B. The Proffered Evidence From Third Party Witnesses Concerning Roberts' Alleged Conduct in the Pre-Limitations Period Does Not Diminish the Correctness of the Lower Court's Finding that Roberts' Conduct Was Not Gender-Specific.

Petitioner attempts to create the illusion of an actionable hostile environment claim based on this Court's decision in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002). Petitioner contends that *Morgan* authorizes the inclusion, as part of her hostile environment claim, of any and all of Roberts' interactions with female employees during the pre-limitations period,[9] even those that pre-dated his

8. The District Court also held that the evidence showed that Roberts criticized Petitioner because he did not believe that she was doing her job effectively, or at least to his satisfaction. (R-97 p. 35; Pet. App. at A145). This additional, unchallenged finding provided yet another gender-neutral explanation for Roberts' conduct.

9. Petitioner filed her Charge of Discrimination with the Equal Employment Opportunity Commission on June 22, 2001. (Pet. p. 25.) As Georgia does not have a deferral state agency, the Charge of Discrimination would normally encompass only those alleged acts of discrimination that fell within the preceding 180-day period (i.e., on or after December 24, 2000). *See* 42 U.S.C. § 2000e-5(e)(1).

actual employment with CAU in January 1998. According to Petitioner, this would include the entire pre-employment period of approximately 7-years during which Roberts worked as an independent contractor for an outside accounting firm that performed annual audits of CAU. Plaintiff even goes so far as to bring in allegations concerning Roberts' pre-employment interactions with female workers at another, unrelated university (i.e., Morehouse School of Medicine) for which Roberts had performed auditing services prior to joining CAU.[10] Petitioner has no justification for making these tremendous leaps.

In *Morgan*, the Court upheld the portion of the Ninth Circuit's decision that allowed a plaintiff in a hostile environment case to present evidence from the pre-limitations period that included the plaintiff's own testimony regarding alleged racially discriminatory acts that he had experienced and the testimony of various other employees regarding management's use of racial jokes, racially derogatory acts, racial epithets, and negative comments regarding the capacity of blacks to be supervisors. 536 U.S. at 120. Here, however, Petitioner is without any pre-limitations evidence concerning Roberts' conduct towards her,[11] and she relies almost exclusively

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10. *See* Pet. pp. 4-5.

11. Petitioner testified upon deposition that Roberts' alleged abuse toward her began in December 2000. (R-77 pp. 141-142). Likewise, Petitioner's EEOC Charge states that the earliest discrimination about which she complains took place on December 22, 2000. (R-13, Ex. A; Pet. App. at A166). In addition to her deposition testimony and EEOC Charge, Paragraph 10 of Petitioner's Amended Complaint states that the alleged "pattern of abuse" began in or about December 2000. (R-13 ¶ 10; Pet. App. at A145). Similarly,

(Cont'd)

on third party testimony concerning Roberts' alleged interactions with other female employees covering a period going back nearly 10 years prior to the starting date of her alleged harassment in December 2000. Furthermore, unlike *Morgan*, where the reported third-party conduct was, on its face, probative of actual race discrimination, the pre-limitations evidence that Petitioner presents is simply more of the same gender-neutral, work-related verbal criticisms involving female employees. The fact is that while Roberts could be abrupt, abrasive and even harsh during his pre-employment contacts with CAU female employees, the record shows that he was equally abrasive with male employees during that same time frame. Thus, Petitioner still fails to make the required showing that Roberts' alleged conduct, even during the pre-limitations period, was "because of sex."

II. The District Court Properly Found that Dismissal of Petitioner's Hostile Environment Claim was Required Because the Conduct Alleged Was Not Severe or Pervasive.

The district court also held that Petitioner "cannot establish the fourth prong of her prima facie case, because [Respondent] Roberts' alleged conduct was not sufficiently severe or pervasive to establish the existence of an actionable hostile work environment." (Pet. App. at A35). Petitioner's misplaced reliance on *Morgan* to import into this case the

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(Cont'd)

Petitioner unequivocally stated in her Responses to Mandatory Disclosures that "Plaintiff contends that ***beginning in or about December 2000, Defendant Roberts began to demonstrate a pattern of abuse towards her***." (R-24 p. 2) (emphasis added).

testimonies of various other female co-workers concerning alleged incidents from the pre-limitations period does nothing to diminish the correctness of the lower court's finding that the conduct which was directed at Petitioner (i.e., the nine alleged harassing acts that took place between December 2000 and June 2001), were "not sufficiently severe or pervasive to establish the existence of an actionable hostile work environment." Thus, Petitioner still fails to satisfy the fourth prong of her prima facie case.

Petitioner's handful of alleged incidents between December 2000 and June 2001 fall woefully short of satisfying the severe and pervasive standard for establishing a Title VII sex harassment claim. To state a claim of actionable sexual harassment, Petitioner must show that the harassment was "sufficiently severe or pervasive 'to alter the conditions of [her] employment and create an abusive working environment.' " *Meritor, supra*, 477 U.S. at 67. The Eleventh Circuit has noted that "[a]ll of the sexual harassment cases upheld by the Supreme Court have involved patterns or allegations of extensive, long lasting, unaddressed, and uninhibited sexual threats or conduct that permeated the plaintiffs' work environment." *Gupta*, 212 F.3d 571, 586 (11th Cir. 2000) (quoting *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 264 (5th Cir. 1999)).

A. Petitioner Cannot Rely Solely on Her and Her Female Co-Workers Subjective Beliefs.

Establishing that harassing conduct is severe or pervasive requires more than an employee's subjective belief that the harassment meets such standards. It also requires that "a reasonable person would perceive the environment as hostile and abusive." *Gupta*, 212 F.3d at 583; *accord Harris*,

supra, 510 U.S. at 21-22 (explaining that the severe and pervasive element contains both a subjective and objective component). The harassment alleged by Petitioner fails the objective test.

Petitioner asks this Court to ignore the undisputed evidence demonstrating that Roberts' actions were equally applied to both men and women; instead, Petitioner submits that Title VII should be expanded beyond its confines to evaluate the subjective effect Roberts' actions had on not only on her but on all of CAU's female employees. Basically, Petitioner asks the Court to climb into her mind and evaluate how Roberts' equally applied militaristic management style personally affected Petitioner (and other female employees) in contrast to her male colleagues. However, Petitioner's subjective view cannot outweigh the district court's decision holding that a reasonable person could not have found Petitioner's work environment hostile or abusive. *See Gupta*, 212 F.3d at 583.

This Court has stated that "the objective severity of the harassment should be judged from the perspective of a reasonable person in the plaintiff's position considering 'all the circumstances.' " *Oncale*, 523 U.S. 75, 81 (1998) (quoting *Harris*, 510 U.S. at 23). That assessment is made "by looking at all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Clark County School District v. Breeden*, 532 U.S. 268, 270-271 (2001) (*per curiam*) (internal citations omitted); *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1245-1246 (11th Cir. 1999) (*en banc*). Plaintiff's claim falls short under the "severe and pervasive" analysis.

B. Petitioner Cannot Establish That The Alleged Harassment Was Sufficiently Severe or Pervasive.

Stripped of the hyperbole, Petitioner's sexual harassment claim distills to an insignificant number of isolated alleged incidents scattered over a six (6) month period.[12] Even when taken together, these events never approach the level of conduct required to constitute a hostile work environment. This Court has made clear that "isolated incidents" such as these are not enough to establish actionable sexual harassment. *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998). The specific incidents alleged by Petitioner, whether analyzed separately or together, simply do not establish conduct sufficiently severe or pervasive to create a hostile environment in violation of Title VII. *See, e.g., Mendoza*, 195 F.3d at 1249 (Affirming the dismissal of a hostile environment claim where the complained of conduct "occurred over an eleven-month period and therefore were far too infrequent to alter the conditions under which [the

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12. The Magistrate Judge succinctly summarized Petitioner's alleged harassing incidents as follows:

> [Petitioner's] nine incidents of harassment over six months from December 2000, through June 2001 – speaking in a harsh tone, nitpicking, saying if she could not do her job then maybe someone else should, yelling at her for going over his heada to Mr. Young, reprimanding her for doing more than he asked on a task, cutting her off and shouting at her for misfiled invoices, abrasively and demandingly describing how to do tasks, and yelling at her for going over his head to HR to discuss her leave – are not sufficiently severe.

Pet. App. at A37-A38.

plaintiff] was required to perform her job."); *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir. 1995) ("We do not think that these [nine] incidents, spread over seven months, could reasonably be thought to add up to sexual harassment.").

In stark contrast to Petitioner's version of "harassment," a Title VII plaintiff must prove that "the workplace is *permeated* with 'discriminatory intimidation, ridicule, and insult,' " *Harris*, 510 U.S. at 21, which "has the purpose or effect of unreasonably interfering with [the] individual's work performance or creating an intimidating, hostile or offensive working environment." *Meritor*, 477 U.S. at 65. This Court held in *Meritor* that "[f]or harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment'." *Id.* at 67 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)). Correspondingly, the Eleventh Circuit has repeatedly held that sporadic, isolated conduct will not maintain a hostile work environment claim. *See, e.g., Watkins v. Bowden*, 105 F.3d 1344, 1355-56 (11th Cir. 1997) (affirming trial court's ruling of no sexually hostile work environment where there were numerous workplace references to the size of men's penises and questioning of the plaintiff about the quality of the sex with her husband).

The District Court correctly concluded that the conduct about which Petitioner complains was not severe, and the Eleventh Circuit did not err in affirming that decision. At most, Petitioner identifies nothing more than an inconsequential number of less than courteous work-related interactions with Roberts, none of which, even by Petitioner's own testimony, indicate hostility towards Petitioner based

on her gender. Petitioner's gender-based hostile environment claim fails because, on her own version, the day-to-day interactions at issue are nothing more than sporadic, isolated occurrences, innocuous comments and events.

More fundamentally, Roberts' interactions with Petitioner were clearly job-related. His critiques identified by Petitioner fall well short, as a matter of law (and common sense), of constituting behavior so objectively severe or pervasive as to alter her working conditions. "Title VII was never intended to protect employees from all unpleasant and rude conduct in the workplace." *Mendoza*, 195 F.3d at 1253 (Edmondson, J., concurring). As this Court has held, Title VII is not a "general civility code." *Faragher*, 524 U.S. at 788. On Petitioner's own version of the facts, her allegations do not begin to sustain a legitimate Title VII sex harassment claim.

Petitioner's abject failure of proof signaled the failure of her claim. Here, just as was noted in previous Eleventh Circuit cases, "a finding that [Petitioner's] complaints constitute sexual harassment would lower the bar of Title VII to punish mere bothersome and uncomfortable conduct and would 'trivialize true instances of sexual harassment.' " *Gupta*, 212 F.3d at 586 (quoting *Mendoza*, 195 F.3d at 1252 n. 10). The sum total of Petitioner's purported sex harassment "evidence" neither merited nor required a trial. Summary judgment for CAU was therefore mandated. Nothing in Petitioner's argument regarding the alleged incidents involving the various other female employees has any bearing whatsoever on the alleged abusive conduct she experienced between December 2000 and June 2001. There is simply no basis for disturbing the lower court's well-supported conclusion that the conduct as alleged did not amount to severe or pervasive harassment. The Petition should be denied.

III. The Decisions From the Eighth and Ninth Circuits are Distinguishable Because They Both Involve Actual Threats of Physical Harm and Evidence of Physical Abuse Against Female Employees.

Petitioner's citations to the Eighth Circuit's decision in *Kopp v. Samaritan Health System, Inc.*, 13 F.3d 264 (8th Cir. 1993), and the Ninth Circuit's decision in *EEOC v. National Education Association, Alaska*, 422 F.3d 840 (9th Cir. 2005), do not alter the outcome of this case. While both *Kopp* and *National Education Ass'n* involved allegations by female plaintiffs concerning the allegedly abusive conduct of male supervisors, the similarities to the present case end there. Unlike here, the conduct of the male harassers in *Kopp* and *National Education Ass'n* was shown to be demonstrably more egregious towards women than men because, in both instances, the alleged conduct also involved "actual physical contact and harm [to the female employees]; [whereas] all of the incidents involving male employees consists only of a raised voice or verbal assault." *Kopp*, 13 F.3d at 269. *See also National Education Ass'n*, 422 F.3d at 843 (noting that the male harasser's "verbal conduct also had a physical accompaniment").

In *National Education Ass'n*, the Ninth Circuit listed several examples of the male harasser's "threatening physical gestures" towards female workers, including lunging across a table and shaking his fist at a female worker; coming up behind a female employee, grabbing her shoulders and yelling "get back to your office"; pumping his fist in a female employee's direction and stepping towards her; and regularly invading female employees' personal space. 422 F.3d at 843-844. Similarly, in *Kopp*, the Eighth Circuit found differential treatment between the sexes based on the fact that the record contained "numerous instances of [the male harasser]

swearing at, throwing objects at, using vulgar names to refer to, and shoving female hospital employees." 13 F.3d at 267. The physical components of these cases clearly distinguish them from Roberts' alleged conduct herein, which was limited to only his "*normal* abrasive and militaristic management style." (Pet. p. 29) (Emphasis supplied).

The record is devoid of any accusations of "threatening physical gestures" or actual physical abuse committed by Roberts. As the Magistrate Judge correctly noted:

> The bare bones of [Petitioner's] allegations are simply that [Respondent] Roberts criticized [Petitioner's] work performance, arguably in a non-constructive way, and perhaps a bit belittling. However, the fact that Defendant Roberts raised his voice and exhibited a militaristic, rigid, management style does not indicate that he was physically threatening.

Pet. App. at 37. The record also reflects that Roberts' verbal tirades were directed to males and females alike.[13]

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13. The Magistrate Judge correctly found that:

> The record in this case shows that Defendant Roberts was harsh and disrespectful toward male employees, such as Mr. Singh, Mr. Alexander, and Mr. Givens, and that Defendant Roberts' abrasive and authoritative management style was exemplified by Defendant Roberts raising his voice and repeating his questions. [Cits. omitted]. Thus, Plaintiff's asserted harassment was not based on her gender because *men and women were accorded like treatment*, and the evidence shows that Defendant Roberts was not well-liked by men or women.

Pet. App. at A32-A33 (emphasis added).

As Petitioner candidly acknowledges at the conclusion of her Petition: "The bottom line is that Mr. Roberts was a bully who loved to push his weight around *with all employees.*" (Pet., p. 29) (Emphasis added). This salient admission highlights the correctness of the lower court's decision to grant summary judgment and the Eleventh Circuit's affirmance thereof. It also confirms why the Petition should be denied.

IV. Petitioner Does Not Seek Review of the Lower Court's Dismissal of Her Retaliation Claim or Her State Law Claims.

The judgment below also dismissed Petitioner's Title VII retaliation claim and her accompanying state law claims for intentional infliction of emotional distress and negligence, which Petitioner has not asked this Court to review. Supreme Court Rule 14.1 requires the petition to contain the "questions presented for review," in order to provide the respondent with sufficient notice and to assist the Court in "selecting the cases in which certiorari will be granted." *Yee v. Escondido*, 503 U.S. 519, 535-536 (1992). Petitioner included only challenges to the lower court's dismissal of her Title VII hostile work environment claim in her question presented and excluded all remaining claims. Petitioner cannot claim that her retaliation claim or her state law claims present questions that are "subsidiary" to and "fairly included" within her question relating to her gender-based harassment claim. Thus, those claims are not presented before this Court. *See, e.g., Glover v. United States*, 531 U.S. 198, 205 (2001) ("As a general rule, furthermore, we do not decide issues outside the questions presented by the petition for certiorari.") (citing Sup. Ct. R. 14.1).

It also should be noted that Petitioner failed to address either her retaliation or state law claims in her appeal to the Eleventh Circuit.[14] That court has consistently held that "arguments not raised in an appellant's initial brief are deemed waived." *Fed. Sav. & Loan Ins. Corp. v. Haralson*, 813 F.2d 370, 373, n.3 (11th Cir. 1987). *Accord Lind v. United Parcel Service*, 254 F.3d 1281, 1283 n.2 (11th Cir. 2001) (citing FRAP 28(a)). As a general rule, this Court also has refrained from deciding issues that were "neither raised in nor passed upon by the Court of Appeals." *Glover*, *supra*, 531 U.S. at 205 ("In the ordinary course we do not decide questions neither raised nor resolved below.") (citing *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992)). *Accord Nelson v. Adams USA, Inc.*, 529 U.S. 460 (2000) ("It is indeed the general rule that issues must be raised in lower courts in order to be preserved as potential grounds of decision in higher courts.")

In this case, the district court granted summary judgment on Petitioner's Title VII retaliation claims based on (1) Petitioner's failure to exhaust her administrative remedies by amending her EEOC charge to include such a claim; and (2) Petitioner's failure to establish a *prima facie* case by showing that she suffered any adverse employment action. (*See* Pet. App. at A38-A48). The district court also granted summary judgment to Roberts and CAU on Petitioner's state law claims for intentional infliction of emotional distress and

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14. The Eleventh Circuit's January 17, 2006 Opinion confirms that only "issues presented on appeal are (1) whether the district court properly granted the defendant's motion to strike the declaration of Richard McLemore; and (2) whether the district court properly granted summary judgment to defendants because Petitioner could not establish a prima facie case of gender-based hostile work environment discrimination." (Pet. App. at A2).

negligence, respectively, because Petitioner failed to satisfy each of the elements necessary to proceed with these claims. (*See* Pet. App. at A48-A57). As previously noted, Petitioner's appellate brief failed to address the district court's dismissal of her retaliation claim and her state law claims; as such, Petitioner abandoned these claims at the circuit court level.

V. The District Court Did Not Abuse Its Discretion in Striking the Affidavit of Richard McLemore.

Petitioner has also failed to show that the district court improperly struck the Declaration of Richard McClemore. Petitioner produced no legal authority on appeal to the Eleventh Circuit supporting her argument that the sham affidavit rule adopted by the Eleventh Circuit in *Van T. Junkins and Assocs., Inc. v. U.S. Indus.*, 736 F.2d 656 (11th Cir. 1984), does not extend to non-party witnesses. Moreover, Petitioner completely failed to address the fact that the district court excluded McClemore's declaration for the separate, independent reason that Petitioner failed to disclose it pursuant to Fed. R. Civ. P. 26 and 37(c). The Eleventh Circuit correctly concluded that the district court did not abuse its discretion in making the evidentiary ruling to strike the declaration. (*See* Pet. App. at A2). Petitioner has made no showing to the contrary here.

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the Petition. Therefore, Respondents respectfully request that the Petition be denied.

Respectfully submitted,

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